IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 738 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SONI KIRIT JIVAN - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR KB ANANDJIWALA for Appellant(s) : 1,
Mr. P.D. Bhate, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 03/04/2006

ORAL JUDGMENT

Heard learned Advocate Mr. K.B. Anandjiwala for appellant, learned APP Mr. P.D. Bhate for the State of Gujarat. Through this appeal, appellant – original accused No.1 in Special Case No. 34 of 1991 has challenged the order of conviction dated 27.5.1993 passed by the Special Judge, Surendranagar in Special Case No. 34 of 1993 wherein the appellant was convicted for the offence under section 332, 504 and 506 (Ist Part) and was ordered to undergo eight days SI and fine of Rs.2000.00, in default, one month's SI and all the sentences were ordered to run concurrently.

2. Short facts of the case of prosecution are to the effect that the complainant Mansukhbhai Virjibhai Rathod belongs to scheduled caste i.e. of Harijan community; he was Deputy Executive Engineer in Water Supply Department of the State of Gujarat at Surendranagar. Incident in question took place on 3.7.1991 at about 9.00 p.m. In the Chamber of the complainant which is situated in 4, Kiran Society,Surendranagar.

Appellant and other accused persons who are the wife and sons of appellant are residing in the neighborhood of the said office and the building in which the office is situated belongs to present appellant. Ownership of said building was of the wife of the appellant i.e. Pravinaben. The Building was given on rental basis for a period of five years to the said office which was expiring on 31.3.1990. From the evidence on record, it appears that the time was extended upto 31.3.1991. The appellant wanted to get said office vacated, therefore, he had issued one notice to the department for vacating the said office. The predecessor of the complainant had made necessary correspondence with the Head Office prior to it. According to the complainant, on the date of the incident, he and his staff had gone for the inspection of well at Muli and Than and they returned at about 8.30 or so in the office of Surendranagar. On 7.7.1991, the Chief Officer of the department was to visit

for inspection and, therefore, they had gone there. It is further alleged that at about 9.00 p.m., all the accused persons had come to the office and they came into the Chamber of the petitioner. It is further alleged that for vacating the said premises, present appellant and others had come and while talking about the same, some quarrel took place between them and thereafter, the accused persons gave filthy abuses to the complainant. As alleged, some blows by means of kicks and fists were also given to the complainant. Regarding the injuries sustained by the complainant, the medical evidence is absolutely silent and the doctor did not find any external marks of injuries. It is also alleged that at the relevant time, the complainant was sitting on his chair and also broken the call bell connection. On this aspect also, the scene of offence Panchanama is absolutely silent about the breaking of call bell connection. Therefore, complaint is contradicted

by certain circumstantial evidence on record. It is further alleged that soon after the incident, the complainant contacted DSP on telephone and informed about the incident whether the information was conveyed by the complainant was recorded and necessary entries were made. According to the appellant, in that information, it was not alleged by the complainant that the accused used abusive language and more particularly used word “Dhedha”. Thereafter, the complainant also informed at the City Police Station telephonically. Thereupon, Head Constable Rahimkhan came at the spot and recorded FIR of the complainant wherein it was alleged by the complainant that the accused uttered insulting words like “Dhedha” and, therefore, offence under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (“Atrocity Act” for short) was registered against accused persons. That on the strength of the FIR, the Head Constable Rahimkhan registered the offence

and started investigation on the next day by preparing the scene of offence panchanama. The statements of some of the witnesses from the office were recorded by him and thereafter, the charge sheet was submitted. Thereafter, charge was framed against the accused persons for the offences under section 147, 149, 332, 504, 506 (1), 447 of the Indian Penal Code ("IPC" for short) and section 10(3) of the Atrocity Act. Thereafter, as the accused pleaded not guilty of the charge levelled against them, and since claimed to be tried, evidence was recorded of about ten witnesses. After considering the evidence on record, trial court held that the accused no.1,3 and 5 are guilty for the offence under section 332, 504, IPC and thereafter, trial court granted benefit of Probation of Offenders Act to accused No.3 and 5 and convicted appellant herein and sentenced to suffer RI for eight days and to pay fine of Rs.2,000.00, in default, ordered to undergo further SI for one

month. After considering the evidence, the trial court held that the accused persons are not guilty for the charge under section 3(10) of the Atrocity Act and acquitted accused persons of the said charge. At the time of arguments, it was conceded by the PP appearing for the State before the trial court that the evidence is not sufficient against accused no. 2 and 4 to show their presence at the relevant time.

3. It was the defence of the accused that at the time of incident, appellant was called by complainant as he is residing just in the neighbourhood of the complainant's office. Thereupon the appellant and his wife went to the office. At that time, the accused no.2 stood out side the chamber of the complainant and the appellant went inside the office of the complainant. It was told by the complainant to the appellant that if he want to get said premises vacated, then, he would have to understand some thing, due to which, appellant

felt that the complainant is demanding some money for the purpose of vacating the house, thereupon, he informed complainant that before about one year, notice was given, even then, you are demanding money as illegal gratification for the same which is not proper. He also told that this unhealthy practice should be deprecated and it should be brought to the light and also told that he would inform head office about the same. Thereafter, appellant left office and thereafter, present complaint was lodged by complainant which is absolutely false and incorrect.

4. Learned advocate Mr. Anandjiwala submits that looking to the complaint itself, presence of other accused was not there. He also submitted that the complainant was not knowing that the other accused persons are sons of appellant. He also submitted that according to the evidence of complainant, only appellant was entering into the office and rest of the accused had not at all

entered into the office. It was not alleged that the other accused persons were in the office at the time when the appellant was in the office. He also submitted that there was no threat given to the complainant by the appellant as there was no allegation made in the complaint and also there is no whisper about threat in his oral evidence. Learned advocate Mr.Anandjiwala submitted that looking to the evidence of complainant in paragraph 9, he was posted in February, 1991 and upto April,1991,appellant had visited twice or thrice the office of complainant but there was no misbehaviour on the part of appellant and no attack was made by appellant against complainant but there was aggressive mood of the appellant to vacate the office and except that, there was no earlier misbehaviour of the appellant narrated in the evidence of the complainant. He also submitted that there was no statement recorded by the head constable at the time when the complainant filed complaint. He

also submitted that from the date of incident, within fifteen days, complainant was transferred from Surendranagar to Harij. He also submitted that in complaint also, complainant had not made mention about threat which was allegedly given by the appellant to the complainant. So, it was the submission of the learned advocate Mr. Anandjiwala that the offence under section 504 and 506 (1) of the IPC is not proved against the appellant beyond reasonable doubt. He also emphasized that mere presence of appellant in the chamber of complainant is not enough to prove the offence under section 332 of the IPC and, therefore, conviction recorded against the appellant is required to be set aside. Alternatively, it was his submission that looking to the passage of time, more than fifteen years from the date of incident and also looking to the age of appellant and also looking to the fact that there is no any criminal history or criminal antecedents against appellant, present appellant

should also be given similar benefit of probation on the same ground on which it was given to accused no. 3 and 5 by the trial court while confirming conviction. He submitted that after passage of more than fifteen years, and also in view of the fact that the appellant is not having criminal history, he may be given same benefit for the same reasons.

5. On the other hand, learned APP Mr. P.D. Bhate appearing for the State has, while supporting the order of conviction, submitted that the charge for the offence under section 332 of the IPC has been proved beyond reasonable doubt against the appellant. According to him, presence of the appellant at the scene of offence was established and entire defence is based on his presence in the chamber at the time of occurrence of the incident in question. According to Mr. Bhate, looking to the evidence of complainant itself, it is sufficient to prove

offence under section 504 and 506(1) of the IPC. According to him, there is corroborative evidence of the witnesses, there is medical evidence also, and, therefore, trial court was right in convicting the appellant and was also right in not giving benefit of Probation of Offenders Act to appellant and in doing so, no error was committed by the trial court and, therefore, this court should not interfere with the impugned order.

6. I have considered the submissions made by the learned advocates for both sides. Trial court decided Special Case No. 34 of 1991. Vide Exh. 2, charge was framed against appellant and other co-accused persons by trial court under section 147, 332, 504, 506 (2) and section 447 of the IPC. Before the trial court, appellant and other accused persons pleaded not guilty of the charges levelled against them and, therefore, they were tried and ultimately, trial court

decided merits of the matter and delivered the order in question. For establishing its case, trial court examined following witnesses before trial court :

(1) Complainant Mansukhbhai Virjibhai Rathod Exh.12; (2) Dr. Bharatiben Pingalsi Gadhvi Exh.17; (3) witness Ambaram Manjibhai Patel Exh.20; (4) witness Kirtikumar Manilal Patel Exh.21; (5) witness Narsibhai Ranchhodbhai Patel Exh.23; (6) witness Dolatdan Ratidan Gadhvi, watchman of the office Exh.25; (7) Police Constable Jagdishchandra Labhshankar Exh.26; (8) Head Constable Khimji Jivaji Exh.29; (9) Police Head Constable Rahimkhan Husenmiya Exh.31; (10) PI and IO Shri Jethalal Kacharabhai Patel Exh. 33. Over and above the aforesaid oral evidence of the witnesses for prosecution, prosecution also produced certain other documentary evidence before the trial court. Thereafter, trial court considered the merits of the matter. As per para 8 of the impugned judgment, Public Prosecutor

appearing before the trial court admitted before the trial court that there was no sufficient evidence coming on record for proving the charge under section 147, 149 of the IPC. That was accepted by the trial court. There is further finding given by the trial court that in respect of accused no. 1, 3 and 5, there was attack by them upon the complainant and he was beaten by accused persons. Considering the evidence on record, trial court acquitted all accused persons for the offence under section 147, 506(2) and 447 of the IPC for want of sufficient evidence. Trial Court acquitted appellant for the offence under section 3(1)(10) while giving benefit of doubt and acquitted accused no.2 to 5 for want of sufficient evidence. Accused No.2 and 4 were also acquitted as innocent from the offence under section 332, 504 of the IPC for want of sufficient evidence. Trial court convicted appellant for the offence under section 332, 504, 506 (Part-I) of the IPC and convicted accused

no.3 and 5 for the offence under section 332,504 read with section 114 of the IPC and, thereafter, the accused no.1, 3 and 5 were heard on the aspect of sentence and after hearing them, trial court sentence of 8 days simple imprisonment and fine of Rs.2000.00 and in default,to undergo one month simple imprisonment against the accused No.1 appellant herein for the offence under section 332,504 and 506(Ist Part). Trial court imposed same sentence against accused No. 3 and 5 but thereafter, ordered that they be exempted from undergoing this sentence provided that they give surety of Rs.2000.00 for a period of one year for good conduct under section 360 of the Code of Criminal Procedure and personal bond of the like amount and the sentence to be imposed if any breach of the bond of good conduct is committed by them.

7. In light of above evidence on record and considering the finding given by the trial court as well as considering the entire facts and

circumstances of the case, evidence which was appreciated has been again similarly appreciated by me. Incident occurred on 3rd July, 1991. Finding in respect of appellant, considering the evidence on record, according to my opinion, order of conviction against appellant would not require any interference of this court and while maintaining the conviction, I am examining the matter in light of the facts whether the appellant is entitled for benefit of Probation of Offenders Act or not. Reason behind is that the accused No. 3 and 5 both were convicted under section 332 and 504 read with section 114 of the IPC. But trial court has given benefit of probation while exercising powers under section 360 of the Code of Criminal Procedure. For that, trial Court has taken into account the age factor of both the accused persons. Today, learned Advocate Mr. Anandjiwala has high-lighted same facts of age of appellant which is now about 59 years. Passage of time, about more than

fifteen years have passed. Appellant is not habitual offender. He is also not having past history about committing offence. There is no enmity between complainant and appellant but due to sudden provocation, offence has been committed by the appellant. Learned advocate Mr. Anandjiwala has relied upon the decision of apex court in Hari Kishan and State of Haryana v. Sukhbir Singh and others, reported in AIR 1988 SC 2127. He submitted that the apex court has granted benefit of probation of good conduct even in case of offence committed and convicted by the trial court under section 325, 149 and 148 of the IPC. He relied upon paragraph 8 of the said decision. Relevant paragraph 8 of said decision is quoted as under:

> "8. The question next to be considered is whether the accused are entitled to the benefit of probation of good conduct ? We gave our anxious consideration to the contentions urged by counsel. We are of opinion that the High Court has not committed any error

> in this regard also. Many offenders are not dangerous criminals but are weak characters or who have surrendered to temptation or provocation. In placing such type of offenders, on probation, the court encourages their own sense of responsibility for their future and protect them from the stigma and possible contamination of prison. In this case, the High Court has observed that there was no previous history of enmity between the parties and the occurrence was an outcome of a sudden flare up. These are not shown to be incorrect. We have already said that the accused had no intention to commit murder of any person. Therefore, the extension of benefit of the beneficial legislation applicable to first offenders cannot be said to be inappropriate. "

Recently, in Sitaram Paswan & Anr. Versus State of Bihar, reported in 2005 (6) Supreme 358, the Apex Court has considered the question that while considering to grant benefit of probation, Court must take realistic view of

the gravity of the offence, the impact which the offence had on the victim. Relevant discussion made by apex court in paragraph 8 and 9 is reproduced as under:

> "8. Section 4 of the Probation of Offenders Act empowers the Court to release a convicted person on his entering into a bond with or without sureties on probation when he is found guilty of committing of any offence, not punishable with death or imprisonment for life. Relevant portion of Section 4 of the Probation of Offenders Act, 1958 reads thus:
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> "Section 4 - Power of Court to release certain offenders on probation of good conduct - (1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period not exceeding three years, as the Court may direct, and in the meantime to keep the peace and be of good behaviour."
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> For exercising the power which is discretionary, the Court has to consider circumstances of the case, the nature of the offence and the character of the offender. While considering the nature of the offence, the Court must take a realistic view of the gravity of the offence, the impact which the offence had on the victim. The benefit available to the accused under Section 4 of the Probation of Offenders Act is subject to the limitation

embodied in the provisions and the word "may" clearly indicates that the discretion vests with the Court whether to release the offender in exercise of the powers under Section 3 or 4 of the Probation of Offenders Act, having regard to the nature of the offence and the character of the offender and overall circumstances of the case. The powers under Section 4 of the Probation of Offenders Act vest with the Court when any person is found guilty of the offence committed, not punishable with death or imprisonment for life. This power can be exercised by the Courts while finding the person guilty and if the Court thinks that having regard to the circumstances of the case, including the nature of the offence and the character of the offender, benefit should be extended to the accused, the power can be exercised by the Court even at the appellate or revisional stage and also by this Court while hearing appeal under Article 136 of the Constitution of India.

9. The fact as emerged in this case. It is apparent that the incident occurred at the spur of the moment and is traverse in nature. There is no material on record to indicate that the appellants have any previous conviction. In the absence of such evidence, we treat appellants as first offenders. A-1, namely, Sitaram Paswan has made the assault using Danda and the fists and caused simple injuries to Krishna Devi, Paltoo Paswan and Vijay Kumar, PW-2, PW-5 and PW-4 respectively. He has been convicted with the aid of Section 34, under Section 324 and under

Section 323 I.P.C. whereas the case of A-2 Raj Kumar is different. He has caused injuries to Paltoo Paswan and Vijay Kumar using the sword. Injury found on Paltoo Paswan is sharp cuts on left side of the head and on Vijay Kumar, cut injury on the left side of the head."

I have given my anxious consideration to the submissions made by learned advocate Mr. Anandjiwala and the learned APP Mr. Bhate. I have also considered the decisions which have been relied upon by Mr. Anandjiwala, looking to the nature of offence occurred on 3rd July, 1991 due to sudden provocation between the appellant and complainant. Appellant is not dangerous criminal and is having weak character and surrendered to provocation. The responsibility of appellant for future and having stigma and possible contamination of prison. There is no previous history of the appellant, of enmity between the parties and incident occurred on 3rd July, 1991 was the outcome of sudden flare up.

There is also no intention, from the evidence on record, to commit offence by the appellant. In view of these facts and also when the trial court has granted benefit of probation to accused no. 3 and 5 under section 360 of the Code of Criminal Procedure, according to my opinion, appellant may also be given a benefit of probation of good conduct under section 4 of the Probation of Offenders Act, 1958. Therefore, considering carefully as well as comprehensively, appellant is satisfying the requirement of section 4 of the Act, 1958, therefore, considering the age of the present appellant which is more than 59, there is no criminal history and there is no enmity between the parties, appellant was having no intention to commit offence and it was due to sudden provocation between the parties and c considering the responsibility of future, of the appellant and protecting appellant from the stigma and possible contamination of prison, I

am inclined to grant benefit of Probation of Offenders Act, 1958 to the appellant, therefore, while maintaining conviction under section 332, 504 and 506 (Part-I) of the IPC against appellant-original accused No. 1, appellant is granted benefit under the Probation of Offenders Act, 1958 and, therefore, it is ordered that the present appellant be given benefit of Probation of Offenders Act, 1958 and fine imposed against appellant be refunded to him. Order of conviction against appellant is confirmed. Accordingly, appeal is disposed of while granting benefit of Probation of Offenders Act, 1958 to the appellant.

(H.K. Rathod,J.)

Vyas